Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyd's, London on behalf of himself and as a representative of Certain Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies,

Petitioners,

vs.

CHEMICAL LEAMAN TANK LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals applied the wrong legal standard to review the District Court's determination as a matter of law on a critical element required by the controlling state law in a diversity action, thereby removing genuine fact issues from the jury's consideration.

(2) Whether the application of regulatory estoppel by the Court of Appeals for the first time on appeal to preclude enforcement of the plain, temporal meaning of the pollution exclusion without an evidentiary hearing to establish the factual elements for estoppel denied petitioner insurers their due process rights as guaranteed by the Fifth Amendment.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Third Circuit were Chemical Leaman Tank Lines, Inc. (as plaintiff-appellee); Aetna Casualty & Surety Company and Robin Anthony Gildart Jackson, an Underwriter at Lloyd's, London, on behalf of himself and as representative of Certain Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies (as defendants-respondents) as follows:

PETITIONERS' RULE 29.6 STATEMENTS

1. **Accident and Casualty Company of Winterthur (now known as Winterthur Swiss Insurance Company)**
Parent Companies:

   Winterthur Swiss Insurance Company is a subsidiary of Winterthur Insurance.

   Subsidiaries:

   None.

2. **Alba General Insurance Company Ltd.**
Parent Companies:

   Alba General Insurance Co. Ltd. is a subsidiary of General of Berne Insurance Company (also known as Berner Allegemeine Versicherungs Gesellschaft).

   Subsidiaries:

   None.

3. **Allianz Cornhill International Insurance plc (formerly known as Allianz International Insurance Co., Ltd.)**
Parent Companies:

   Allianz Cornhill International Insurance plc is a division of Cornhill Insurance plc whose ultimate parent corporation is Allianz Aktiengesellschaft (AG) Holding.

Subsidiaries:

None.

4. **Argonaut Northwest Insurance Company**
Parent Companies:

Argonaut Northwest Insurance Company's outstanding capital stock, except for director's qualifying shares (6), is owned by Argonaut Insurance Company. Ownership of that company since October 1, 1986 has been held by Argonaut Group, Inc. (DE), a Los Angeles based holding company.

Subsidiaries (except for wholly owned):

None.

5. **Assicurazioni Generali S.P.A.**
Parent Companies:

Assicurazioni Generali S.P.A. is the parent company of the Generali Group whose shares are quoted on Italian stock exchanges.

Subsidiaries (except for wholly owned):

None.

6. **Baloise Fire Insurance Company**
Parent Companies:

Baloise Fire Insurance Company is a wholly owned subsidiary of Baloise Holding, the parent company of the Baloise Group.

Subsidiaries (except for wholly owned):

None.

7. **Bellefonte Insurance Company Limited**
Parent Companies:

Bellefonte Insurance Company Limited was merged into Northwestern National Insurance Group, whose

immediate parent is Armco Financial Services Corp., and whose ultimate parent is Armco Inc.

Subsidiaries (except for wholly owned):

None.

8. **Certain Underwriters at Lloyd's, London**
Parent Companies:

The Underwriters at Lloyd's, London are natural persons.

Subsidiaries (except for wholly owned):

None.

9. **CNA International Reinsurance Co. Ltd. (formerly known as CNA Reinsurance of London Co. Ltd.)**
Parent Companies:

CNA International Reinsurance Co. Ltd., a member of the CNA Financial Group, is directly owned (100%) by CNA Management Company Limited, a down-stream holding company of Continental Casualty Company, Chicago, Illinois which in turn is controlled by CNA Financial Corporation, Chicago, Illinois, the parent and holding company of the CNA Insurance Group. The ultimate holding company is Loews Corporation in New York, N.Y.

Subsidiaries (except for wholly owned):

None.

10. **Delta Lloyd Non-Life Insurance Company**
Parent Companies:

Delta Lloyd Non-Life Insurance Company is a wholly owned subsidiary of Commercial Union International Holdings, Ltd. which in turn is owned by Commercial Union plc, a publicly owned company.

Subsidiaries:

None.

11. Dominion Insurance Company Limited
Parent Companies:

Dominion Insurance Company Limited's ultimate holding company is La Fondiaria Spa. Its immediate holding company is Dominion Insurance Holdings Ltd (100%)

Subsidiaries (except for wholly owned):

None.

12. Drake Insurance Company Limited (now known as Sphere Drake Insurance plc)
Parent Companies:

Sphere Drake Insurance plc is under the ultimate control of Sphere Drake Holdings Limited, a Bermuda holding company. Sphere Drake Holdings Limited's financial control resides with senior management and a group of international investors, which retain 53.73% ownership of the holding company. Among the institutional investors are: Centre Capital Investors L.P., an investment partnership affiliated with Lazard Freres & Co. (N.Y.); The Dai-Tokio Fire & Marine Insurance Company Limited; Electra Investment Trust P.L.C. and John C. Head III.

Subsidiaries (except wholly owned):

None.

13. Excess Insurance Company Limited
Parent Companies:

Excess Insurance Company Ltd. is a wholly owned subsidiary of London & Edinburgh Insurance Group Limited which is incorporated in England which in turn is a wholly owned subsidiary of Hartford International Insurance Company (formerly Abbey International Corporation), Delaware, US. The ultimate parent is ITT Corporation, New York, which also owns ITT Hartford Insurance Group.

Subsidiaries (except for wholly owned):

None.

14. **Fidelidade Insurance Company**
Parent Companies:

Fidelidade Insurance Company is controlled by the government of Portugal through the Caixa Geral de Depositos which owns 97% of the shares. The balance of shares is held directly by the government. The Caixa Geral de Depositos is a wholly owned government bank.

Subsidiaries:

None.

15. **Gan Minster Insurance Company Limited (formerly known as Minster Insurance Company Ltd.)**
Parent Companies:

Gan Minster Insurance Company Limited is a wholly owned subsidiary of Financial Holdings Limited. Its ultimate parent company is Societe Centrale du Gan, France.

Subsidiaries (except wholly owned):

(1) Progress Insurance Company Ltd.
(2) Progress Assurance SA
(3) Arthur Street Investments Ltd.
(4) Arthur Street Management Ltd.
(5) Hobbs Savill Ltd.
(6) Minster Assets Ltd.
(7) Minister Development Co. Ltd.
(8) Minster Discount & Guarantee Co. Ltd.
(9) Minster Estate & Property Co. Ltd.
(10) Minsure Nominees Ltd.
(11) Robert Bradford & Co. Ltd.
(12) Robert Bradford Ltd.
(13) Touchline Service Ltd.

16. **Helvetia Accident Swiss Insurance Company Limited (now known as ELVIA Swiss Insurance Co. Ltd.)**
Parent Companies:

Elvia Swiss Insurance Co. Ltd. is a publicly traded company that is listed on several European stock exchanges. In 1991 SwissRe Holding Limited and Swiss Re, Zurich, acquired a majority share of the voting capital of Elvia Swiss Insurance Company.

Subsidiaries:

None.

17. **London and Edinburgh Insurance Company Limited**
Parent Companies:

London and Edinburgh Insurance Company Limited is a wholly owned subsidiary of London and Edinburgh Insurance Group Limited, incorporated in England which in turn is a wholly owned subsidiary of Hartford International Insurance Company (formerly Abbey International Corporation), Delaware, US. The ultimate parent is ITT Corporation, New York, which also owns ITT Hartford Insurance Group.

Subsidiaries (except for wholly owned):

Excess Underwriting Management Singapore Limited.

18. **National Casualty Company**
Parent Companies:

National Casualty Company's controlling stock is owned by Nationwide Life Insurance Company, which acquired complete control on December 31, 1993. Operations are directed by the same general management which runs the Nationwide Group.

Subsidiaries:

None.

19. **National Casualty Insurance of America Ltd.**
Parent Companies:

National Casualty Company Insurance of America Ltd.'s controlling stock is owned by Nationwide Insurance Company, which acquired complete control on December 31, 1993. Operations are directed by the same general management which runs the Nationwide Group.

Subsidiaries:

None.

20. **New London Reinsurance Company Limited (now known as NRG Victory Reinsurance Ltd.)**
Parent Companies:

NRG London Reinsurance Company Ltd. is a wholly owned subsidiary of NRG (U.K.) Holdings Limited which in turn is majority owned by Internationale Verzekeringen N.V.

Subsidiaries:

None.

21. **North Atlantic Insurance Company Limited (formerly known as British National Insurance Company Limited)**
Parent Companies:

North Atlantic Insurance Company's parent company is CI Holdings Limited. The ultimate parent is Wingfield Limited.

Subsidiaries:

None.

22. **River Thames Insurance Company Limited**
Parent Companies:

River Thames Insurance Company Limited's immediate holding company is Transamerica Insurance Company,

incorporated in the United States, which owns 51% of the company. The ultimate holding company is Transamerica Corporation, also incorporated in the United States. The remaining 49% is owned by Sedgwick Group plc, which is incorporated in Great Britain.

Subsidiaries (except for wholly owned):

None.

23. **Scottish Lion Insurance Company**
Parent Companies:

Scottish Lion Insurance Company's parent company is China Merchants' Holding Company Limited.

Subsidiaries:

None.

24. **Sovereign Marine & General Insurance Company Limited**
Parent Companies:

Sovereign Marine & General Insurance Company Limited is wholly owned by Willis Corroon Group plc, a holding company with numerous insurance brokerage subsidiaries, whose shares are traded on the London Stock Exchange.

Subsidiaries (except for wholly owned):

None.

25. **Sphere Insurance Company Limited (now known as Sphere Drake Insurance plc)**
Parent Companies:

Sphere Drake Insurance plc is under the ultimate control of Sphere Drake Holdings Limited, a Bermuda holding company. Sphere Drake Holdings Limited's financial control resides with senior management and a group of international investors, which retain 53.73% ownership of the holding company. Among the institutional

investors are: Centre Capital Investors L.P., an investment partnership affiliated with Lazard Freres & Co. (N.Y.); The Dai-Tokio Fire & Marine Insurance Company Limited; Electra Investment Trust P.L.C. and John C. Head III.

Subsidiaries (except for wholly owned):

None.

26. **St. Paul International Insurance Company Limited (formerly known as St. Katherine Insurance Co. Ltd.)**
Parent Companies:

St. Paul International Insurance Company Limited is a wholly owned subsidiary of St. Paul (UK) Limited, a holding company incorporated in the United Kingdom. Direct stock ownership of the holding company is held by the St. Paul Companies Inc., a publicly traded holding company in the United States.

Subsidiaries (except for wholly owned):

None.

27. **Swiss Union Gerneral Insurance Company Limited**
Parent Companies:

Swiss Union General Insurance Co. Ltd.'s majority of capital was acquired by Generali-Assicurazioni Generali S.P.A. in December 1987.

Subsidiaries (except for wholly owned):

None.

28. **Taisho Marine & Fire Insurance Company (Europe) Ltd. (formerly known as Taisho Marine & Fire Insurance Company (U.K.) Ltd.)**
Parent Companies:

Taisho Marine & Fire Insurance Company (Europe) Limited's ultimate holding company is Mitsui Marine

and Fire Insurance Company Limited (previously named Taisho Marine and Fire Insurance Company Limited).

Subsidiaries (except for wholly owned):

None.

29. **Tokio Marine & Fire Insurance Company (U.K.) Limited**
Parent Companies:

Tokio Marine & Fire Insurance Company (U.K.) Limited is wholly owned by the Tokio Marine and Fire Insurance Company Limited of Japan.

Subsidiaries (except for wholly owned):

None.

30. **Turegum Insurance Company**

Turegum Insurance Company is a wholly owned subsidiary of Zurich Insurance Company (also known as Zurich Versicherungs-Gesellschaft).

Subsidiaries:

None.

31. **Unionamerica Insurance Company Limited**
Parent Companies:

Unionamerica Insurance Company Limited was purchased by International Insurance Investors L.P., Keystone Inc., and Acadia Partners L.P. from The Continental Corporation on September 10, 1993. The company's immediate parent became Unionamerica Acquisition Company Limited, incorporated in England and a subsidiary of the ultimate parent Unionamerica Holdings plc, also incorporated in England.

Subsidiaries (except for wholly owned):

None.

32. World Auxiliary Insurance Corporation Limited
Parent Companies:

World Auxiliary Insurance Corporation Limited is a wholly owned subsidiary of Commercial Union Assurance Company plc which is, in turn, a wholly owned subsidiary of Commercial Union plc.

Subsidiaries:

None.

33. Yasuda Insurance Company (U.K.) Limited
Parent Companies:

Yasuda Fire & Marine Insurance Company of Europe Limited is a wholly owned by of Yasuda Fire & Marine Insurance Company Limited, Japan.

Subsidiaries:

None.

Petitioners before this Court are Robin Anthony Gildart Jackson, an Underwriter at Lloyd's, London on behalf of himself and as a representative of Certain Underwriters At Lloyd's, London, and Certain Subscribing London Market Insurance Companies as listed more fully above.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	xv
TABLE OF CONTENTS OF APPENDIX	xviii
OPINIONS BELOW	2
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	13
I. THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARD TO REVIEW THE DISTRICT COURT'S DETERMINATION AS A MATTER OF LAW ON A CRITICAL ELEMENT REQUIRED BY THE CONTROLLING STATE LAW IN THIS DIVERSITY ACTION, THEREBY REMOVING GENUINE FACT ISSUES FROM THE JURY'S CONSIDERATION	13
A. The Court Must Grant Review To Constrain The Court of Appeals To Apply The Correct Standard Of Judicial Review For Removing Essential Fact Issues From The Factfinder's Consideration.	14

Page

II. APPLICATION OF REGULATORY ESTOPPEL BY THE COURT OF APPEALS FOR THE FIRST TIME ON APPEAL TO PRECLUDE ENFORCEMENT OF THE PLAIN, TEMPORAL MEANING OF THE POLLUTION EXCLUSION WITHOUT AN EVIDENTIARY HEARING TO ESTABLISH THE FACTUAL ELEMENTS FOR ESTOPPEL DENIED PETITIONER INSURERS THEIR DUE PROCESS RIGHTS AS GUARANTEED BY THE FIFTH AMENDMENT..... 18

A. An Evidentiary Hearing Would Have Shown That Chemical Leaman Could Not Sustain Its Burden To Establish The Requirements of Estoppel..... 20

CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	15
Atlantic Coast Line R. Co. v. Powe, 283 U.S. 401 (1931)	18
Brady v. Southern Railroad, 320 U.S. 476 (1943)	14
Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 403 A.2d 880 (N.J. 1979)	20
Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980)	18
Dick v. New York Life Ins. Co., 359 U.S. 437 (1959)	15
Edinburgh Assur. Co. v. R.L. Burns Corp., 479 F. Supp. 138 (C.D. Cal. 1979), *aff'd. in part & rev'd. in part*, 669 F.2d 1259 (9th Cir. 1982)	5
Greene v. McElroy, 360 U.S. 474 (1959)	20
Horsemen's Benevolent & Protective Ass'n v. Atlantic City Racing Ass'n, 487 A.2d 707 (N.J. 1985)	20
House v. Mayo, 324 U.S. 42 (1945)	18
Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951)	19
Joy Technologies Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992)	22
Joy Technologies Inc. v. Liberty Mut. Ins. Co., No. 88-C-96-F, Hearing Tr. (W.Va. Circuit Ct. Oct. 5, 1993)	22
J.T. Baker v. Aetna Casualty & Surety Co., 1996 U.S. Dist. LEXIS 11600 (D.N.J. Aug. 5, 1996)	17

	Page
Lynch v. United States, 292 U.S. 571 (1934)	19
Lytle v. Household Mfg.,Inc., 494 U.S. 545 (1990)	15
Matthews v. Eldridge, 424 U.S. 319 (1976)	19
McDermott Int'l Inc. v. Wilander, 498 U.S. 337 (1991)	15
Miller v. Miller, 478 A.2d 351 (N.J. 1984)	20
Morton Intern., Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S.Ct. 2764 (1994)	*Passim*
Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994)	11
Public Service Comm'n v. Brashear Freight Lines Inc., 306 U.S. 204 (1939)	18
Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957)	15
State of New Jersey v. Signo Trading Int'l. Inc., 612 A.2d 932 (N.J. 1992)	13
Sunal v. Large, 332 U.S. 174 (1947)	18
United States v. Carver, 260 U.S. 482 (1923)	18
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	19
Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941)	10
Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255 (N.J. 1992)	8
Wolff v. McDonnell, 418 U.S. 539 (1974)	19

	Page
Constitution of the United States:	
U.S. Const., amend. V.	*Passim*
Statutes and Rules:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1332	7
Sup. Ct. R. 10(a)	14
Fed. R. Civ. P. 50(a)	*Passim*
Fed. R. Civ. P. 50(b)	9, 10
Fed. R. Civ. P. 56	14

Page

TABLE OF CONTENTS OF APPENDIX

Order of the United States Court of Appeals for the Third Circuit, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*, denying petition for rehearing by Robin Anthony Gildart Jackson, Underwriter at Loyds, London, et al., July 22, 1996 ..... A-1

Opinion of the United States Court of Appeals for the Third Circuit, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*, 89 F.3d 976 (1996)..... A-4

Order of the United States Court of Appeals for the Third Circuit granting panel rehearing, and vacating opinion, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*, 68 F.3d 685 (1995)..... A-74

Opinion of the United States Court of Appeals for the Third Circuit, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*, 68 F.3d 658 (1995)..... A-75

Opinion of the United States District Court for the District of New Jersey, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.* (unreported), November 8, 1993..... A-134

Opinion of the United States District Court for the District of New Jersey, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.* (unreported), April 22, 1993 ..... A-143

	Page
Judgment Order of the United States District Court for the District of New Jersey, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*, granting judgment in favor of Chemical Leaman, April 7, 1993	A-155
Special Verdict Form of the United States District Court for the District of New Jersey, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*, April 7, 1993	A-158
Opinion of the United States District Court for the District of New Jersey, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*, 817 F. Supp. 1136 (1993)	A-174
Opinion of the United States District Court for the District of New Jersey, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*, 788 F. Supp. 846 (1992)	A-234
Petitioner Insurers' Revised Joint Jury Instruction (excerpts) to the United States District Court for the District of New Jersey, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*	A-251
Official Charge of the Jury (excerpts) in the United States District Court for the District of New Jersey, *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.*	A-254
Transcript of Proceedings of United States District Court for the District of New Jersey (Jury Charge), *Chemical Leaman Tank Lines Inc. v. Aetna Casualty & Surety Company, et. al.*, (excerpts), April 6, 1993.	A-260

Page

Petitioner Insurers' Petition for Rehearing to the United States Court of Appeals for the Third Circuit and Suggestion for Rehearing *En Banc* in *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.* (July 5, 1996)..... A-270

Amicus Curiae Brief of the State of New Jersey Department of Environmental Protection to the United States Court of Appeals for the Third Circuit, filed in *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.* (October 26, 1995)..... A-290

Insurer Aetna Casualty & Surety Co.'s Post-Trial Reply Brief and Exhibits to the United States Court of Appeals for the Third Circuit (excerpts), *in Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.* (June 17, 1994).. A-300

Petitioner London Market Insurers' Post-Trial Reply Brief and Exhibits to the United States Court of Appeals for the Third Circuit (excerpts), in *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.* June 7, 1994..... A-329

Petitioner London Market Insurers' Post-Trial Brief and Exhibits to the United States Court of Appeals for the Third Circuit (excerpts), in *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.* (April 4, 1994)..... A-379

Insurer Aetna Casualty & Surety Co.'s Post-Trial Brief and Exhibits to the United States Court of Appeals for the Third Circuit (excerpts), *in Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.* (April 4, 1994).. A-399

Page

Transcript of Proceedings Before the Superior Court of West Virginia (Oral Opinion) in *Joy Technologies v. Liberty Mut. Ins. Co.*, No. 88-C-96-F (October 5, 1993)..... A-423

Insurer Aetna Casualty & Surety Co.'s Brief and Exhibits in Support of Cross-Motion for Summary Judgment in the United States District Court for the District of New Jersey (excerpts), *in Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company, et al.* (October 9, 1992)..... A-436

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyd's, London on behalf of himself and as a representative of Certain Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies,

Petitioners,

vs.

CHEMICAL LEAMAN TANK LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Robin Anthony Gildart Jackson, an Underwriter at Lloyd's, London on behalf of himself and as representative of Certain Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies, designated as "London Market Insurers," respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The initial opinion of the Court of Appeals (A-75 to A-133) was reported at 68 F.3d 658. The order of the Court of Appeals vacating its initial opinion and granting panel rehearing is reported at 68 F.3d 685. (A-74). The second opinion of the Court of Appeals on rehearing is reported at 89 F.3d 976. (A-4 to A-73) The District Court's opinions granting partial summary judgment are reported at 788 F. Supp. 846 (A-234 to A-250) and 817 F. Supp. 1136 (A-174 to A-233). The District Court's judgment order, rendered on April 7, 1993 (A-155 to A-157), is unreported.

JURISDICTIONAL STATEMENT

The Court of Appeals issued its ruling on rehearing on June 20, 1996. London Market Insurers timely filed a petition for rehearing *en banc*, which was denied on July 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, U.S. Constitution, provides in pertinent part that: "no person shall .... be deprived of life, liberty, or property without due process of law."

Federal Rule of Civil Procedure 50(a) provides as follows:

> (a) Judgment as a Matter of Law.
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

STATEMENT OF THE CASE

This appeal stems from a declaratory judgment action brought by Chemical Leaman Tank Lines, Inc. ("Chemical Leaman") against Petitioners London Market Insurers, seeking coverage under certain liability insurance policies to which London Market Insurers severally subscribed for damages as a result of environmental pollution at Chemical Leaman's tank truck terminal in Bridgeport, New Jersey.

A. FACTUAL BACKGROUND

Chemical Leaman is a tank truck company that specializes in the transport of bulk chemicals and other liquids. It operates a number of terminals around the country, many of which had tank cleaning facilities, including one in Bridgeport, New Jersey. To avoid cross-contamination of customers' products, each tank truck, unless dedicated to carrying a particular chemical product, must be cleaned after each delivery before being refilled. In 1960, Chemical Leaman opened its Bridgeport terminal to dispatch and clean tank trucks in a secluded part of rural Gloucester County, New Jersey. The waste water generated by the routine tank truck cleaning operation was intentionally discharged into three unlined earthen ponds that were interconnected by "tee pipes." The last lagoon in the series had a discharge pipe into adjacent wetlands. (A-14).

In September 1961, an inspector from the New Jersey Division of Fish, Game and Wildlife complained to Chemical Leaman that the waste discharges from the original ponds into adjacent wetlands were unacceptable and that the resulting pollution should be abated within one year. Chemical Leaman responded by installing three additional unlined lagoons of roughly similar size to receive waste water pumped from the

original series of unlined ponds. Again, the last lagoon in the newly constructed series was designed with an outflow pipe into the neighboring swamp. (A-14). In November 1968, water pollution control officials of the New Jersey Department of Health returned to the Bridgeport terminal and informed Chemical Leaman that the wastes emanating from the lagoons were "highly pollutional." In February 1969, the state ordered Chemical Leaman to undertake "immediate measures" to eliminate the polluting discharges or implement an improved waste treatment system. (A-14). In May 1969, Chemical Leaman submitted a plan to improve its waste treatment system, but the state regulators deemed it unsatisfactory. (A-14). Although Chemical Leaman knew that the continuing waste water discharges into the lagoon system presented problems to state officials, it continued to use the lagoon system until 1975 when Chemical Leaman arranged with Du Pont to treat wastes at a Du Pont facility. The ponds and lagoons remained until 1977 when Chemical Leaman finally drained them, removed the accumulated sludge and filled them with brickbat. (A-15). During its operation, approximately 100 million gallons of contaminated waste water were processed in the Bridgeport terminal lagoon system. (A-70).

This attempted closure merely prolonged Chemical Leaman's worsening environmental problems. In 1980, twenty years after Chemical Leaman began intentionally discharging contaminated waste water into the unlined lagoon system, a routine survey by the New Jersey Department of Environmental Protection ("NJDEP") discovered ground water contamination in the vicinity of Chemical Leaman's Bridgeport terminal. Further investigation determined that the primary source of contamination were the former ponds and lagoons on the Chemical Leaman property. (A-15). In 1984, the United States Environmental Protection Agency ("USEPA") placed the Bridgeport terminal on the Superfund National Priorities List. In 1985, several years before notifying its insurers, Chemical Leaman entered into a consent decree with the USEPA in which it agreed to remediate the environmental contamination at the Bridgeport terminal. (A-15). To date, Chemical Leaman reportedly has incurred over $9 million in

connection with remediation efforts at the Bridgeport terminal.

On April 18, 1988, Chemical Leaman gave notice of an insurance claim regarding the environmental clean-up at the Bridgeport facility to its primary liability insurance carrier, Aetna Casualty & Surety Company ("Aetna"). (A-183). Approximately one year later on March 30, 1989, less than fourteen days prior to commencing this action, Chemical Leaman provided notice of the environmental insurance claim at the Bridgeport terminal to Petitioners through Chemical Leaman's Pennsylvania insurance broker, Stewart Smith East Inc. (A-183). The instant action was filed on April 12, 1989, in the United States District Court for the District of New Jersey. (A-237). London Market Insurers answered the complaint, denying the insurance claim on several grounds, including, *inter alia*, that there was no "occurrence" as required by the policies because Chemical Leaman expected or intended to cause harm to the environment, and that the pollution exclusion in several of the policies precluded coverage.

B. THE INSURANCE POLICIES

Chemical Leaman purchased comprehensive general liability policies from Aetna covering successive years from April 1, 1960 through April 1, 1985. It also acquired excess liability policies structured in various layers with differing limits of liability over the same period. Most of these excess liability insurance policies were subscribed to by London Market Insurers. Various domestic insurers co-insured portions of certain excess policies, but Chemical Leaman elected not to name them in this action.[1] The insuring agreement in the

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[1] The London Market is a subscription insurance market in which insurers severally subscribe to insurance policies for a proportionate share of the risk. *Edinburgh Assur. Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144-45 (C.D. Cal. 1979), *aff'd in part and rev'd in part*, 669 F.2d 1259 (9th Cir. 1982). Although the full collection of London Market insurance policies issued to Chemical Leaman from 1959 to 1985 were produced during discovery, Chemical Leaman elected to name only certain insurance company subscribers to the London Market policies. During the pendency

(Footnote continued)

London Market policies states with minor variance that insurance coverage is provided for:

> all sums which the Assured shall be obligated to pay by reason of the liability ... imposed upon the Assured by law,...for damages... on account of: (i) Personal Injuries... (ii) Property Damage... caused by or arising out of each occurrence....

(A-188).

Under this insuring clause, to establish coverage an insured must prove the existence of an "occurrence." London Market Insurers' policies define "occurrence" to mean:

> [a]n accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, [or] property damage...during the policy period.

(A-188).

Each London Market policy in effect from 1971 onward contains a pollution exclusion. From April 1, 1971 to April 1, 1974, and from April 1, 1977 to April 1, 1985, the London Market policies contain the NMA 1685 (NMA referring to the Non Marine Association) pollution exclusion, which excludes coverage for personal injury, bodily injury or property damage caused by seepage, pollution or contamination unless "such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance." (A-189). At the request of Chemical

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of the appeal, Chemical Leaman through its counsel of record confirmed which insurance company subscribers to the London Market policies were proper parties to the action before the District Court. The appeal before the Court of Appeals and this Petition are made only on behalf of Certain Underwriters at Lloyd's, London and those insurance company subscribers which Chemical Leaman has identified as parties, which are set forth in the Rule 29.6 Statement.

Leaman, the London Market policies in effect from April 1, 1974 through April 1, 1977, contain the standard ISO (ISO referring to the Insurance Services Office) pollution exclusion which precludes coverage for property damage arising out of the discharge, dispersal, release or escape of contaminants or pollutants, unless the "discharge, dispersal, release or escape is sudden and accidental." (A-187).

C. DISTRICT COURT PROCEEDINGS

On April 12, 1989, less than two weeks after giving notice of claim to London Market Insurers, Chemical Leaman filed its complaint in the United States District Court for the District of New Jersey against Aetna and London Market Insurers. (A-237). Jurisdiction in the District Court was premised on 28 U.S.C § 1332, diversity of citizenship. (A-237). The complaint sought a declaration of insurance coverage under certain liability policies issued by Aetna and London Market Insurers.[2] (A-237).

Following extensive discovery, in October 1990, the parties cross-moved for partial summary judgment on various issues, including, *inter alia*, the relevant substantive law to be applied. The District Court held that New Jersey law governed the policy interpretation issues. (A-244). In September 1992, the parties again filed cross-motions for summary judgment on a host of legal issues pertinent to this appeal. London Market Insurers sought summary judgment against Chemical Leaman on the ground that it had not carried its burden of proving an "occurrence" as required by the insurance policies, that is, Chemical Leaman "expected or intended"

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[2] When the lawsuit began, Chemical Leaman sought insurance coverage under insurance policies in effect from 1959 to 1986. On cross-motions for summary judgment, the District Court ruled that there was no environmental damage in the 1959 policy year. (A-200). Further, on two separate occasions, respectively, prior to and during trial, Chemical Leaman voluntarily dismissed the London Market policies in effect between April 1, 1985 and April 1, 1986, and then between April 1, 1981 and April 1, 1985. (A-19 n.4).

environmental damage at the Bridgeport terminal. (A-190). Chemical Leaman crossed-moved, conversely claiming an occurrence under the policies. The parties also disputed whether the inquiry into Chemical Leaman's intention or expectation ought to be subjective or objective. (A-194). New Jersey jurisprudence at the time of motion practice required an evaluation of the insured's subjective intent to injure, unless "exceptional circumstances" objectively established the insured's intent to injure. *See Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1265 (N.J. 1992). On March 12, 1993, three days prior to the scheduled trial, the District Court decided the cross-motions for summary judgment. It held, as a matter of law, that Chemical Leaman's conduct at the Bridgeport terminal did not constitute "exceptional circumstances" and would be evaluated under a subjective intent standard. (A-197). The Court then denied the cross-motions for summary judgment on whether Chemical Leaman subjectively expected or intended environmental damage, concluding that genuine issues of fact existed. (A-205).

London Market Insurers also sought partial summary judgment based on the pollution exclusions in their policies. The District Court refused to entertain Chemical Leaman's belated argument that the insurers' alleged regulatory misrepresentations to state insurance officials should estop them from advancing a more restrictive interpretation of the pollution exclusion. (A-216 n.16). The District Court found as a matter of law that Chemical Leaman expected or intended discharges of known pollutants into the lagoons, held that the pollution exclusion precluded coverage as to soil damage at the site, but denied partial summary judgment based on the pollution exclusion with respect to ground water contamination and did not address contamination to the surrounding wetlands. (A-218).

On March 15, 1993, the parties began a three week trial to determine whether there was insurance coverage for damages caused by Chemical Leaman's polluting activities at the Bridgeport terminal. At the close of Chemical Leaman's case in chief and later renewed at the close of all evidence, London

Market Insurers moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure on several grounds, including that evidence of "exceptional circumstances" had been sufficiently established so as to warrant judgment as a matter of law for London Market Insurers. (A-144). The Court denied London Market Insurers' Rule 50(a) motion and further held *sua sponte* as a matter of law that "exceptional circumstances" did not exist. (A-148). London Market Insurers then requested a jury instruction, asking the jury to determine if "exceptional circumstances" existed. (A-251). The District Court rejected London Market Insurers' requested jury charge, thereby completely and finally removing the issue from the jury's consideration. (A-260 to A-269).

The jury returned a special verdict on April 7, 1993, with multiple fact findings, including one that Chemical Leaman did not expect or intend to cause environmental damage at the Bridgeport facility. (A-158 to A-173). The District Court molded the judgment on the jury's special verdict, reciting, *inter alia*, that Chemical Leaman was entitled to indemnification and reimbursement from the insurers under the insurance policies in effect from April 1, 1960 to April 1, 1971, for costs associated with investigating and remediating soil contamination at and in the vicinity of the Bridgeport facility; indemnification and reimbursement from the insurers under the insurance policies in effect from April 1, 1960 to April 1, 1981, for costs associated with investigating and remediating ground water contamination; and finally for indemnification and reimbursement from the insurers under the insurance policies in effect from April 1, 1961 to April 1, 1971, for costs associated with investigating and remediating the wetlands damage. (A-155 to A-157).

London Market Insurers timely filed post-trial motions under Rule 50(b) of the Federal Rules of Civil Procedure. The District Court denied the Rule 50(b) motions. (A-140).

D. THIRD CIRCUIT PROCEEDINGS

London Market Insurers timely appealed the judgment to the United States Court of Appeals for the Third Circuit.[3] During the pendency of the appeal, the New Jersey Supreme Court in *Morton Int'l Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S.Ct. 2764 (1994) addressed the "expected or intended" aspect of the "occurrence" clause in liability policies in the environmental pollution context.[4] *Morton* recognized the unique circumstances surrounding insurance claims for environmental damage and acknowledged the "impracticality of adherence to the general rule that we look to the insured's subjective intent to determine intent to injure." 629 A.2d at 879. After surveying the prior New Jersey case law on the "expected or intended" standard in insurance coverage cases, the *Morton* court mandated that an alternative "exceptional circumstances" approach must be applied in environmental insurance disputes to objectively establish an insured's expectation or intention. 629 A.2d at 880.[5] In its initial 50-page Opinion dated October

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[3] After oral argument before the Third Circuit, but prior to original Third Circuit decision, Chemical Leaman and Aetna settled all claims between themselves arising from this dispute.

[4] *Morton* was decided while London Market Insurers' Rule 50(b) motions were pending. London Market Insurers twice asked the District Court if it desired supplemental briefing in light of *Morton* on the pending Rule 50(b) motions. The District Court never asked for supplemental briefing. The District Court's rulings on the Rule 50(b) motions do not mention *Morton*. Nonetheless, the Court of Appeals was obligated to follow *Morton* even though it was decided after the trial below. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941).

[5] *Morton* enunciated a multi-factor test to evaluate whether policyholders expected or intended environmental damage:

> Instead, we hold that in environmental-coverage litigation a case-by-case analysis is required in order to determine whether, in the context of all the available evidence, "exceptional circumstances" [exist] that objectively establish the insured's intent to injure." Those circumstances include the duration of the discharges, whether the discharges oc-

(Footnote continued)

12, 1995, the Third Circuit relied upon the alternative "exceptional circumstances" test in *Morton* in reversing the District Court judgment and in entering judgment as a matter of law in favor of London Market Insurers on those insurance policies incepting after 1968. The Third Circuit's initial decision carefully reviewed the trial record and held that the evidence compelled the conclusion that "exceptional circumstances" existed as matter of law after 1968, eliminating insurance coverage. (A-117 to A-118). The Third Circuit's initial decision, later withdrawn, remanded the matter for retrial on the insurance policies in effect before 1968. The initial opinion by the Court of Appeals did not address the pollution exclusion in light of its holding that no coverage existed on occurrence grounds for the policies incepting after 1968.

Chemical Leaman, thereafter, filed a timely petition for rehearing and suggestion for rehearing *en banc*. The Third Circuit granted panel rehearing and vacated its original decision. (A-74). On June 20, 1996, a reconstituted majority panel of the Court of Appeals changed course, affirmed the District Court's rulings in part, and remanded the case for a reallocation of damages among applicable policies in accordance with *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994). (A-44).

In its ruling on rehearing, the Court of Appeals committed two fundamental errors which warrant review by this Court. First, the circuit court departed from the established standard of review of rulings under Federal Rule of Civil Procedure 50(a) when it concluded that the critical issues of fact

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curred intentionally, negligently, or innocently, the quality of the insured's knowledge concerning the harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm.

629 A.2d at 880 (citations omitted).

surrounding Chemical Leaman's expectation or intention to injure -- applying *Morton*'s "exceptional circumstances" test -- could be removed from the jury's consideration "if a reasonable jury could find" evidence of the lack of exceptional circumstances.

Secondly, the Court of Appeals addressed for the first time on appeal the issue of regulatory estoppel to preclude enforcement of the plain meaning of the pollution exclusion in the London Market policies. The issue of regulatory estoppel in the context of the pollution exclusion clause had its genesis in *Morton*. There, addressing the issue for the first time on appeal without an evidentiary hearing on any factual issue, the *Morton* court found that the Insurance Rating Board ("IRB"), as a representative of certain insurance carriers, had misled the New Jersey state regulators about the effect of the standard ISO pollution exclusion when the IRB secured regulatory approval for the exclusion.[6] 629 A.2d at 847, 874. As a result of the alleged misrepresentations, the insurers were estopped from enforcing what *Morton* conceded to be the plain meaning of the word "sudden" in the standard ISO pollution exclusion, which would have barred insurance coverage for pollution damage from gradual, non-sudden pollution discharges. 629 A.2d at 847. Mimicking the unconstitutional error in *Morton*, for the first time on appeal, the Third Circuit extended the *Morton* estoppel ruling to the pollution exclusions found in the London Market policies without affording

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[6] *Morton* rebuffed the insurers' request for an evidentiary hearing, observing, *inter alia*:

> Although the insurers urge that we not consider the regulatory history of the standard clause without a fuller record, we are persuaded that a remand would be redundant, and this record together with the reported cases that address the regulatory history and the abundant independent commentary on the subject affords an accurate and comprehensive basis for our determination.

629 A.2d at 848.

London Market Insurers a prior factual hearing on the necessarily fact-bound issue of regulatory estoppel.

London Market Insurers timely sought rehearing *en banc*. The Court of Appeals denied rehearing *en banc* on July 22, 1996.

Principles of fundamental fairness as well as constitutional protections dictate that this Court grant review to remedy such grave injustice.[7]

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARD TO REVIEW THE DISTRICT COURT'S DETERMINATION AS A MATTER OF LAW ON A CRITICAL ELEMENT REQUIRED BY THE CONTROLLING STATE LAW IN THIS DIVERSITY ACTION, THEREBY REMOVING GENUINE FACT ISSUES FROM THE JURY'S CONSIDERATION.

In upholding the District Court's at-law determination of the absence of "exceptional circumstances" as defined by *Morton*, the Third Circuit abandoned the traditional standard of judicial review, as established by this Court, over lower

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[7] The importance of these issues is demonstrated by the *amicus curiae* filings by the Attorney General of the State of New Jersey. After the Court of Appeals vacated its initial decision, the Attorney General filed an *amicus curiae* brief in support of Chemical Leaman. (A-290 to A-299). The Attorney General argued that unless the Third Circuit reversed its decision on the "expected or intended" standard, the State of New Jersey would be irreparably harmed, as numerous hazardous waste sites would not be remediated. The Attorney General's public policy arguments, however, were not then and are not now a legitimate basis to nullify clear contract wording. *See State of New Jersey v. Signo Trading Int'l Inc.*, 612 A.2d 932, 940 (N.J. 1992) ("[P]ublic policy considerations alone are not sufficient to permit a finding of coverage in an insurance contract when its plain language cannot fairly be read otherwise to provide that coverage.")

court determinations under Rule 50(a).[8] This appeal raises serious questions about the proper application of the Federal Rules of Civil Procedure. Since this Court has supervisory responsibility over the federal judiciary, it is obligated to provide lower courts with guidance when there is a prejudicial departure from the customary application of the Federal Rules of Civil Procedure. London Market Insurers respectfully request that this Court exercise its discretionary authority pursuant to Supreme Court Rule 10(a) and grant certiorari to rectify an erroneous application of the Federal Rules of Civil Procedure.

A. The Court Must Grant Review To Constrain The Court of Appeals To Apply The Correct Standard Of Judicial Review For Removing Essential Fact Issues From The Factfinder's Consideration.

In *Brady v. Southern Railroad*, 320 U.S. 476 (1943), this Court articulated the judicial standard of review for when a court may remove essential fact issues from the jury's consideration:

> When the evidence is such that without weighing the credibility of the witnesses there can be but *one reasonable conclusion* as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict.

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[8] The District Court twice decided as a matter of law that "exceptional circumstances" were absent, first on cross-motions for summary judgment under Rule 56, and second during trial on London Market Insurers' Rule 50(a) motion. (A-148). Since the insurers' Rule 50(a) motion was the final opportunity for the District Court to address the "exceptional circumstances" issue before the jury received the case, this Petition focuses upon the standard of judicial review of the District Court's Rule 50(a) ruling. However, there is no legal difference between the standard of judicial review for at-law determinations under Rule 56 or Rule 50(a), which deprive a party of a jury-fact determination.

Id. at 479-80 (emphasis added). On numerous occasions, this Court has echoed the familiar principle that where reasonable factfinders could disagree on essential fact issues, the fact question is not for the court, but must be submitted to the jury. *E.g.*, *McDermott Int'l Inc. v. Wilander*, 498 U.S. 337, 356 (1991); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986). Simply, a court may not, after reviewing the evidence, remove the case from the jury "because it might believe that the jury could *reasonably* find for the nonmoving party." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 555 (1990) (emphasis in original).

Disregarding established standards of judicial review, the reformulated majority panel of the Court of Appeals on rehearing concluded that the District Court properly entered judgment as a matter of law that "exceptional circumstances" as postulated by *Morton* were absent because "a reasonable jury could find" evidence of the lack of "exceptional circumstances." The Court of Appeals plainly erred. The Third Circuit on rehearing engaged in precisely what this Court expressly forbade lower courts to do, that is, sanction the deprivation of genuine fact issues from the factfinder because the court believes that a jury could reasonably find in favor of the nonmoving party on the point.

The Third Circuit on rehearing twice misstated the standard of review:

> We believe a reasonable jury *could* find Chemical Leaman did not engage in a "pattern of stonewalling." On the contrary, a jury *could* conclude that Chemical Leaman's behavior suggests a good faith effort at compliance with agency demands.

(A-32) (emphasis added.) Rather, the standard of review which the Third Circuit invoked is reserved for those situations in which the appealing party is challenging a fact determination submitted to the factfinder. *See Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 374 (1957); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444-47 (1959). The standard of judicial review invoked here is clearly inapposite

in situations where factual issues are removed from the jury's consideration and decided by the court as a matter of law. Conspicuously absent from the Court of Appeals' opinion on rehearing is a determination that the *only* reasonable conclusion which a reasonable jury could reach is that "exceptional circumstances" did not exist.[9] In fact, an examination of the trial evidence as recounted in the Court of Appeals' initial majority opinion and later dissenting opinion on rehearing compels the conclusion that a jury could indeed find "exceptional circumstances."[10] Therefore, it should have been impossible for the Court of Appeals to reach its erroneous

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[9] In a footnote to the majority opinion on rehearing, the Court of Appeals acknowledged the contours of the proper standard of review, which it then did not apply:

> We believe that *Morton* did not displace the usual relationship between the court and the jury. It remains the unique province of the jury to resolve disputed issues of fact - such as the intentions or expectations of the insured. Only in cases where there is no legally sufficient evidentiary basis for a reasonable jury to find for a party may the court enter judgment as a matter of law. *Morton* refines the test for when a court may enter judgment as a matter of law in environmental pollution cases. Its "exceptional circumstances" define when no reasonable jury could find the insured did not intend or expect to cause property damage because objective circumstances--evidence of prolonged, intentional, or flagrant discharges of known pollutants in the face of regulatory disapproval--establish that the insured must have intended property damage.

(A-31 n.7). There is a polar difference between the footnote phrase "when no reasonable jury could find" and the textual phrase "a reasonable jury could find." London Market Insurers are not complaining about a semantic distinction, but request relief from the application of a clearly erroneous standard of review. Certiorari review by this Court is warranted to correct this fundamental error.

[10] The differing conclusions drawn from the same trial evidence found in the initial majority opinion and the dissenting opinion on rehearing amply illustrate that reasonable persons could differ on the inferences to be drawn on the evidence going to the *Morton* factors of "exceptional circumstances."

conclusion on rehearing if it had followed established precedent. Even if the Court of Appeals was disinclined to grant judgment as a matter of law to London Market Insurers on the ground that "exceptional circumstances" existed, at the very least, the Third Circuit was duty bound to reverse the judgment and remand the matter to the District Court for a new trial.

Besides the prejudicial impact upon the contract rights of London Market Insurers, the clear departure by the Court of Appeals from established precedent offends the public policy goals underpinning *Morton*. There, the New Jersey Supreme Court articulated the "exceptional circumstances" test as an objective alternative to the subjective intent standard because "absent 'smoking gun' testimony from a disgruntled employee, proof of subjective intent to cause environmental harm will rarely be available in coverage litigation." *Morton*, 629 A.2d at 879. *Morton* thus formulated an alternative legal test to level the playing field between insureds and insurers in coverage litigation. The Court of Appeals' opinion on rehearing, absent relief from this Court, sanctions the removal of the alternative "exceptional circumstances" test from the fact-finder's consideration where the trial judge "could find" that any one of the exceptional circumstance factors is missing. Such a result runs afoul of the coverage interpretation goals of *Morton*. Furthermore, the Court of Appeals decision will be used wrongfully to compel insurers to reimburse a policyholder for its "expected or intended" pollution damages as well as serve as precedent to authorize lower courts to remove genuine fact issues from a jury's consideration. Also, this Court should grant this Petition to obviate the District Courts applying *Morton* incorrectly and, thereby, prompting numerous unnecessary appeals.[11]

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[11] The negative impact in the pollution context is already evident. In *J.T. Baker v. Aetna Casualty & Surety Co.*, 1996 U.S. Dist. LEXIS 11600 (D.N.J. Aug. 5, 1996), the New Jersey District Court found in the context of determining the proper standard to be applied to determine Baker's intent that the "law in this area was recently clarified by the Third Circuit

(Footnote continued)

II. APPLICATION OF REGULATORY ESTOPPEL BY THE COURT OF APPEALS FOR THE FIRST TIME ON APPEAL TO PRECLUDE ENFORCEMENT OF THE PLAIN, TEMPORAL MEANING OF THE POLLUTION EXCLUSION WITHOUT AN EVIDENTIARY HEARING TO ESTABLISH THE FACTUAL ELEMENTS FOR ESTOPPEL DENIED PETITIONER INSURERS THEIR DUE PROCESS RIGHTS AS GUARANTEED BY THE FIFTH AMENDMENT.

Relying on *Morton*'s reformation of the standard ISO pollution exclusion because of alleged regulatory misrepresentations by certain insurer representatives, the Court of Appeals held that London Market Insurers were estopped from enforcing the plain meaning of the pollution exclusions found in their policies. (A-37). While the theory of regulatory estoppel was known to Chemical Leaman before trial, it elected not to pursue it. (A-216 n.16). The estoppel theory became significant for the first time on appeal to the Court of Appeals. The application of the *Morton*[12] estoppel doctrine without an

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in Chemical Leaman III, which clearly held that the test is a subjective one." *Id.* at *33.

[12] The fact that this Court denied the insurers' Petition For Writ Of Certiorari in *Morton* is immaterial to the current Petition. As this Court has remarked, "[t]he denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923); *accord Sunal v. Large*, 332 U.S. 174, 181 (1947); *House v. Mayo*, 324 U.S. 42, 48 (1945); *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 403 (1931). Moreover, in *Morton*, the insurance carriers were the prevailing parties. Frequently, this Court has refused to consider an appeal by a party who was successful on the merits below. *See Public Serv. Comm'n v. Brashear Freight Lines Inc.*, 306 U.S. 204, 206 (1939); *Deposit Guar. Nat'l Bank etc. v. Roper*, 445 U.S. 326, 333 (1980). In contrast, the present matter is ripe for review by this Court.

evidentiary hearing unconstitutionally deprived London Market Insurers of their contractual property rights.[13]

The Due Process Clause of the Fifth Amendment requires some form of hearing before an individual is finally deprived of a property interest. As this Court explained in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951), the

> right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Accord Matthews v. Eldridge, 424 U.S. 319, 333 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). Over the constitutional objections of London Market Insurers below, the Court of Appeals ignored the constitutional guarantees of the Fifth Amendment and extended *Morton*'s regulatory estoppel ruling to the pollution exclusions in the London Market policies without an evidentiary hearing on the contested factual predicates upon which the regulatory estoppel ruling is based. (A-340 to A-342).

By necessity, extension of *Morton*'s estoppel rule to London Market Insurers on appeal required the Court of Appeals to engage in appellate de novo fact-finding. The Court of Appeals relied upon fragmentary and unverified factual assertions which could not be challenged through cross-examination at a duly constituted evidentiary hearing. Besides violating London Market Insurers' constitutional due process guarantees, the Court of Appeals unfairly rewarded Chemical Leaman's deliberate decision not to pursue the regulatory estoppel theory at trial. Fundamental fairness is the polestar of due process. This basic principle of equity was ignored by the

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[13] Contract rights such as those denied below have long been recognized as property interests warranting protection under the Fifth Amendment. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977); *Lynch v. United States*, 292 U.S. 571, 578-79 (1934).

Court of Appeals. Fundamental fairness should have prompted the Court of Appeals to fault Chemical Leaman for its deliberate refusal to present the estoppel theory at trial and expose it to challenge. Instead, the Court of Appeals chose to penalize London Market Insurers, deprive petitioners of their fundamental right to an evidentiary hearing before their contract rights were denied, and bestow a windfall upon Chemical Leaman. This Court should demonstrate its tradition of zealously protecting due process rights, *Greene v. McElroy*, 360 U.S. 474, 497 (1959), and grant this Petition.

A. An Evidentiary Hearing Would Have Shown That Chemical Leaman Could Not Sustain Its Burden To Establish The Requirements of Estoppel.

To establish equitable estoppel under New Jersey law, the party asserting estoppel, or Chemical Leaman here, has the burden to prove:

> Conduct amounting to a misrepresentation or concealment of material facts known to the party allegedly estopped and unknown to the party claiming estoppel, done with the intention or expectation that it will be acted upon by the other party and on which the other party does in fact rely in such a manner as to change his position for the worse gives rise to an equitable estoppel.

Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 403 A.2d 880, 882-83 (N.J. 1979); *accord Horsemen's Benevolent & Protective Ass'n v. Atlantic City Racing Ass'n*, 487 A.2d 707, 712-13 (N.J. 1985); *Miller v. Miller*, 478 A.2d 351, 355 (N.J. 1984).

Simply stated, in order to establish the claim of estoppel against London Market Insurers, Chemical Leaman was required to demonstrate that (1) London Market Insurers submitted misleading filings before the New Jersey insurance regulators on the pollution exclusion; (2) Chemical Leaman was unaware of the purported limitation in coverage presented

by the pollution exclusion; (3) London Market Insurers intended that Chemical Leaman rely upon the misrepresentations; (4) Chemical Leaman reasonably relied upon the purported misrepresentations; and (5) Chemical Leaman suffered a detriment as a result. London Market Insurers challenged each of the necessary factual predicates for estoppel before the Court of Appeals and urged an evidentiary hearing prior to resolving the contested factual assertions.

If an evidentiary hearing was allowed, London Market Insurers would have successfully challenged the claim of estoppel. In fact, Chemical Leaman's conscious decision not to pursue the estoppel theory at trial speaks volumes about its chance of success.

As the Court of Appeals was informed, London Market Insurers were never members of the IRB, which was the alleged source of the regulatory misrepresentations about the effect of the pollution exclusion clause to the New Jersey regulators. (A-336 and A-361). Next, the extension of *Morton*'s regulatory estoppel holding to the London Market policies at issue defied common sense because these policies were placed by Chemical Leaman's Pennsylvania insurance brokers in accordance with the Pennsylvania insurance statutory scheme governing surplus lines insurance. (A-335 and A-348 to A-351). Moreover, the result in *Morton* was brought about by an allegedly deceptive explanation of the standard ISO pollution exclusion.[14] Since Chemical Leaman requested inclusion of the "sudden and accidental" pollution exclusion in the London Market policies, it is illogical to extend the *Morton* estoppel rule to wording which the insured sought. (A-333). As surplus lines insurers, acting in an unregulated and unlicensed capacity in both New Jersey or Pennsylvania, the London Market Insurers did not submit, nor were they required to

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[14] *Morton* expressly exempted non-standard pollution exclusions from its holding. 629 A.2d at 847. Except for the London Market policies between 1974 and 1977, the other post-1971 London Market policies had the "non-standard" NMA 1685 pollution exclusion. *A fortiori*, *Morton's* regulatory estoppel holding does not apply to the NMA 1685 pollution exclusion.

submit, any explanation of the NMA 1685 non-standard pollution exclusion to the New Jersey or Pennsylvania insurance regulators.[15] (A-336). There was no proof whatsoever that London Market Insurers had made any alleged misrepresentations to any state insurance regulator or that London Market Insurers as surplus lines insurers had any obligation to say anything. Further, any argument that Chemical Leaman was entitled to an reduction in insurance premiums with the advent of the pollution exclusion in 1971 is nonsensical in light of the fixed three-year insurance premium which Chemical Leaman paid between 1968 and 1971 for the excess coverages and Chemical Leaman's growth in revenue and assets in the same three years. (A-370 to A-378). Finally, Chemical Leaman fully understood the limitation in coverage presented by the pollution exclusions in the London Market policies. Chemical Leaman's Pennsylvania insurance broker testified on deposition that the word "sudden" in the pollution exclusion had a temporal limitation. (A-461).

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[15] Elsewhere, London Market Insurers have successfully contended that *Morton* is not applicable to the non-standard NMA 1685 pollution exclusion. In *Joy Technologies Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 498-99 (W. Va. 1992), the West Virginia Supreme Court held that based on alleged regulatory representations, the "sudden and accidental" pollution exclusion was limited to barring coverage only for pollution damage which was intended or expected. However, on remand, the West Virginia state court in *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, No. 88-C-96-F, Hearing Tr. at 13-14 (W. Va. Circuit Ct., Oct. 5, 1993), rejected the policyholder's argument that all carriers, including London Market Insurers, should be bound by the same estoppel holding. The court recited: "However, as a matter of fairness and due process, that principle, that estoppel, in my opinion, is not applicable to the London Market and other companies in this case who did not make such appearances, who were not represented by any associations, who were not connected in any way to any of the companies that were before the Insurance Commissioner during that time." (A-431). The court granted summary judgment to London Market Insurers, construing the word "sudden" in the pollution exclusion according to its plain, temporal meaning. *Id.* at 16 (A-432). The same result was required in the case *sub judice*.

Succinctly stated, if London Market Insurers were not denied their due process rights as guaranteed by the Fifth Amendment, the windfall bestowed upon Chemical Leaman would have been avoided.

CONCLUSION

London Market Insurers respectfully request that this Petition for a Writ Of Certiorari be granted to ensure that the integrity of the Federal Rules of Civil Procedure are upheld and that the principles of procedural due process enshrined in the Fifth Amendment are protected.

Dated: October 19, 1996

Respectfully submitted,

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